

WETLANDS COUNCIL

MINUTES

February 14, 2017

The Wetlands Council met on Tuesday, February 14, 2017 in Rooms 112, 113, 114 at the Department of Environmental Services, 29 Hazen Drive, Concord, NH

Attendees: Chairman Chip Kimball, Councilors: Sheridan Brown, James Kennedy, Deborah Lievens, Richard Mellor, Seth Prescott, Russ St. Pierre, Susan Slack, Robert Snelling and Bob Wolff

Absentees: Councilors: Carol Henderson

Also present was: Carolyn Guerdet, Council Clerk and Paula Scott, Appeals Clerk

The regular Wetlands Council meeting was called to order by Chairman Kimball 9:37 a.m. with introductions and a quorum present.

1. Approval of Minutes

- ***Councilor Wolff made a motion to approve the January 10, 2017 meeting minutes as modified, second by Councilor St. Pierre . Motion passed unanimously with Councilor Lievens abstaining.***

2. Public Input: None

3. Status of Appeals

Paula Scott, Appeals Clerk

I. New Appeals

Docket No. 16-20 WtC – Matthew and Katherine Lowrie, et al. Appeal

Subject: 9/12/16 approval of Wetlands Restoration Plan for McCarthy Subdivision, LRM file #2015-02245 (EMD3009)

Hearing Officer: Not assigned

Status: October 12, 2016 received Petition for Appeal and Appearance for Sherilyn Young. November 1, 2016 received Motion to Summarily Dismiss Petition. 11/14/16 issued receipt of Appeal letter. 11/14/16 received Objection to Motion to Summarily Dismiss. 11/17/16 received Appearance of Richard Head. 11/23/16 received McCarthy's Reply to Appellants' Objection to Motion to Motion for Summary Dismissal. Please note the Council may have to determine whether the Appeal is within the Council's jurisdiction at their December 13, 2016 meeting. It also appears that the Appeal is insufficient. If the Council determines that the Appeal is within its jurisdiction, it may be necessary for the Appeals Clerk to send a notice of insufficient Appeal, as required under Env-WtC 203.03, and any insufficiencies corrected by the petitioner, before the Council decides whether to accept or deny the Appeal. December 13, 2016 the Council voted to table the appeal for their Attorney's opinion. Chairman Kimball has spoken with Counsel and it needs to be further reviewed so it will be pushed back another month. January 10, 2017 Council voted to table the Appeal until February for their attorney's opinion as memo from AGO not ready. 1/20/17 received Appearance from Atty. Brooks and Memorandum in Support of Motion to Summarily Dismiss Petition for Appeal. 1/26/17 received Appellants' Response to DES' Memorandum in Support of Motion for Summary Dismissal. Council to accept or decline the appeal at the February meeting. February 14, 2017 discussion of Appeal. The January 20th Memorandum filed by DES Motion was untimely. 202.13 allows the Council to waive the rules regarding timeliness for good cause – the Council will now know the actual process used by DES in enforcement and DES' legal position.

- ***Councilor Prescott made a motion to waive Rule 204.02 using Rule 202.13 regarding timely filing of Memorandum, second by Councilor Snelling. Discussion was held. Motion passed with one nay.***

In the appeal references to Alteration of Terrain, not under 482 A or B, and is not properly before the Council. The Council extensively discussed the appeal and filings of all parties. Can a restoration plan be so permit-like, even without a wetlands permit, that it should trigger standing before the Council? Under current statute this Council can't accept this appeal. It appears that there is no standing on this appeal through RSA 482-A, RSA 21-O, or RSA 541. The recourse is not through this Council. The abutter could sue DES directly for enforcement. There is concern about the appeal process as a landowner can avoid permitting and abutter standing by acting without a permit and then responding to any DES LOD

- ***Councilor Slack made a motion to grant the Motion for Summary Dismissal and not accept the Appeal, second by Councilor Brown. Motion passed with 8 ayes and 2 nays – Councilors Prescott and St. Pierre.***

Chairman Kimball to send to out ruling.

Docket No. 16-21 WtC – Frederick Ziegler, III Appeal

Subject: 9/22/16 Administrative Order No. 16-023 WD

Hearing Officer: Not assigned

Status: October 20, 2016 received Notice of Appeal. November 28, 2016 issued insufficient Appeal letter.

December 28, 2016 received revised Notice of Appeal. January 3, 2017 issued receipt of revised appeal letter.

Appeal appears to still be insufficient. Council declined appeal at their January 10, 2017 meeting. 1/11/17 issued Ruling on Acceptance of Appeal – not accepted.

II. Decisions that need to be written/finalized and issued.

Docket No. 15-12 WtC – N. Miles Cook III Appeal

Subject: 10/9/15 denial of permit application #2015-00960

Hearing Officer: David Conley, Esq. appointed by AG on 2/22/16

Status: November 5, 2015 received Petition for Appeal. 11/9/15 issued receipt of Appeal letter. 11/20/15 received Appearance from Atty. Maloney for DES. Council to accept or dismiss at their February 9, 2016 meeting. Appeal was accepted at the February 9, 2016 Council meeting. 2/23/16 issued Appeal accepted letter. 2/25/16 issued notice of Pre-hearing Conference schedule for 3/28/16 at 9:30 a.m. 3/28/16 issued Pre-hearing Order scheduling hearing for June 14, 2016 at 9 a.m. May 13, 2016 received State's Witness and Exhibit List. 5/13/16 received Appellant's Witness and Exhibit List. June 2, 2016 received motion to Continue Hearing. 6/8/16 issued letter granting Motion to Continue Hearing, rescheduling it for August 9, 2016 at 9 a.m. Hearing held August 9, 2016. Deliberations were held August 30, 2016. Appeal was denied on a 5-5 vote. December 2, 2016 issued draft Decision and Order to the Council for comments. 12/13/16 issued Decision and Order denying Petition for Appeal. January 10, 2017 received Appearance from Atty. Michael Tierney and Motion for Reconsideration/Rehearing. 1/17/17 received DES' Objection to Appellant's Motion for Reconsideration/Rehearing. 1/20/17 received Reply to DES' Objection to Motion for Reconsideration/Rehearing. 1/27/17 received DES' Sur-reply to Appellant's Reply to DES' Objection to Motion for Reconsideration/Rehearing.

As there are questions of law, hearing officer Atty. Dave Conley came before the Council and reviewed the references in the filings. 'Need' was discussed extensively as there is no clear definition in the wetlands statute and rules. Discussion was held on each argument presented by the appellant.

- ***Councilor Snelling made a motion to deny the Motion to Reconsider, second by Councilor Lievens. Discussion was held. Motion passed with one nay and Councilor Prescott abstaining.***

Chairman Kimball to write decision consistent with Council discussion and the Hearing Officer's recommendations.

Docket No. 16-17 WtC Robert C. Brown Appeal

Subject: 8/19/16 permit #2009-01521

Hearing Officer: Not assigned

Status: September 19, 2016 received Petition for Appeal and Motion to Extend Time. November 21, 2016 issued receipt of Appeal letter. Please note the Council may have to determine whether the Appeal is within the

Council's jurisdiction at their December 13, 2016 meeting. It also appears that the Appeal is insufficient. If the Council determines that the Appeal is within its jurisdiction, it may be necessary for the Appeals Clerk to send a notice of insufficient Appeal, as required under Env-WtC 203.03, and any insufficiencies corrected by the petitioner, before the Council decides whether to accept or deny the Appeal. December 13, 2016 Council voted to issue a ruling declining to accept Appeal as untimely filed. 12/12/16 received letter dated December 9, 2016

from Appellant. Council needs to issue ruling declining to accept Appeal. 12/29/16 received letter dated December 28, 2016 from Appellant. Discussion was held to clarify the 30 days according to the statute and interpretation. Councilor St. Pierre is to send the 2013 Supreme Court ruling he found to Chairman Kimball. It was decided to have legal counsel review. He will also send the ruling to Council Clerk to be sent to the total Council. January 10, 2017 Council decided to get opinion from their attorney.

It was decided the recent Supreme Court rulings (based on RSA 677) also apply to RSA 482-A in applicability of the weekend time extension.

- ***Councilor Brown made a motion to vote to Rescind the December 13, 2016 determination of untimeliness and to determine the Appeal was timely filed and direct the clerk to send letter of insufficient Appeal, second by Councilor Lievens. Motion passed unanimously.***

Chairman Kimball will deny the time extension request in the ruling.

III. Hearings or PHCs Pending

Docket No. 16-12 WtC – William M Ranney Appeal

Subject: 6/23/16 Approval of Shoreland Permit #2016-01071

Hearing Officer: David Conley, Esq. appointed by AG on 11/8/16

Status: July 5, 2016 received Request for Appeal. 7/14/16 issued Insufficient Appeal letter. 7/19/16 received Revised Appeal. 7/20/16 issued Receipt of Appeal letter. Council accepted the appeal September 13, 2016. 9/23/16 received Motion to Intervene from Permittee. November 7, 2016 issued Appeal accepted letter. A Motion to Intervene has been filed. November 7, 2016 issued Appeal accepted letter. December 2, 2016 Hearing Officer granted Motion to Intervene. 12/12/16 issued Notice of Pre-hearing Conference scheduled for January 23, 2017 at 9:30 a.m. 1/23/17 issued Pre-hearing Order scheduling hearing for April 11, 2017 at 9 a.m. 1/30/17 received Authorization of Representation from property owner-Deborah Forte. February 1, 2017 issued Order on Request for Clarification of Pre-hearing Order.

Docket No. 16-18 WtC – Harold Lyon, Jr., Trustee Appeal

Subject: 9/1/16 denial of after-the-fact request to replace and reconfigure dock, File #2014-02205

Hearing Officer: David Conley, Esq. appointed by AG on 01/20/17

Status: September 30, 2016 received Notice of Appeal and Appearance for Regina Nadeau. October 24, 2016 issued insufficient Appeal letter. November 16, 2016 received refiled Appearance for Attorney Nadeau and Revised Petition for Appeal. 11/28/16 issued receipt of revised Appeal letter. Council to accept or decline Appeal at their January 10, 2017 meeting. 01/05/17 received cover letter, Appearance of Jason Reimers for abutters and a Petition to Intervene. January 10, 2017 Council accepted the Appeal. 1/13/17 issued Appeal accepted letter. 1/30/17 issued Notice of Pre-Hearing conference scheduled for February 22, 2017 at 11 a.m. February 2, 2017 received Appearance from Atty. Allen Brooks for DES.

IV. Inactive/Status Letter or Pending Settlement/Withdrawal

Docket No. 14-12 WtC – Susan and Mark Hilbert Appeal

Subject: 6/30/14 Administrative Order No. 14-016 WD

Hearing Officer: David Conley, Esq. appointed by AG on 9/12/14

Actions: July 28, 2014 received Notice of Appeal. 7/30/14 issued insufficient appeal letter. August 8, 2014 received revised Notice of Appeal. 8/11/14 issued receipt of Revised Notice of Appeal. Council accepted appeal at the September 9, 2014 meeting. 9/10/14 issued appeal accepted letter. 9/18/14 issued Notice of Prehearing Conference scheduled for October 27, 2014 at 1:00 p.m. 10/13/14 received Appearance from Christopher Aslin

for the department. 10/27/14 issued Prehearing Order staying the appeal pending the outcome of the Superior Court Quiet Title action. June 16, 2016 issued request for a status report of the pending appeal. 6/24/16 received appeal status update; still pursuing appeal.

Docket No. 14-13 WtC – Ergendino Perrone and Robert Gleason Appeal

Subject: 6/30/14 Administrative Order No. 14-016 WD

Hearing Officer: David Conley, Esq. appointed by AG on 9/12/14

Actions: July 30, 2014 received Notice of Appeal. 7/31/14 issued receipt of appeal letter. Council accepted appeal at the September 9, 2014 meeting. 9/10/14 issued appeal accepted letter. 9/18/14 issued Notice of

Prehearing Conference scheduled for October 27, 2014 at 1:00 p.m. 10/13/14 received Appearance from Christopher Aslin for the department. 10/21/14 received Assented-To Motion to Stay Proceedings. 10/22/14 issued letter granting Motion to Stay Proceedings. July 1, 2015 received appellant's Withdrawal of Counsel Philip Braley. 7/6/15 received appellant's withdrawal of counsel Cooley Arroyo. June 16, 2016 issued request for a status report of the pending appeal. 6/24/15 received appeal status update from Ergendino Perrone. July 8, 2016 received appeal status update from Robert Gleason.

Docket No. 14-14 WtC – Jeffrey Norton et al. Appeal

Subject: 6/30/14 Administrative Order No. 14-016 WD

Hearing Officer: David Conley, Esq. appointed by AG on 9/12/14

Actions: July 30, 2014 received Notice of Appeal. 7/31/14 issued insufficient appeal letter. August 6, 2014 received revised Notice of Appeal. 8/7/14 issued receipt of Revised Notice of Appeal. Council accepted appeal at the September 9, 2014 meeting. 9/10/14 issued appeal accepted letter. 9/18/14 issued Notice of Prehearing Conference scheduled for October 27, 2014 at 1:00 p.m. 10/13/14 received Appearance from Christopher Aslin for the department. 10/22/14 received Assented-To Motion to Stay. 10/23/14 issued letter granting Motion to Stay. June 16, 2016 issued request for a status report of the pending appeal. 6/28/16 received appeal status update.

V. Misc.

4. New Business

Draft of Annual Report was reviewed. Any comments should be made directly to Chairman Kimball. The 2017 Legislative Tracking Matrix was distributed for Council's review and pertinent bills noted.

5. Old Business

6. Next Meetings –

April 11, 2017 at 8:00 a.m. with the William M. Ranney Appeal Hearing at 8 a.m.

7. Adjournment

- ***Councilor Snelling made a motion to adjourn, second by Councilor Lievens. Motion passed unanimously.***

Meeting adjourned at 11:30 a.m.